

**In the United States Court of Appeals
for the Ninth Circuit**

**MAURIE STARRELS and DORIS W. STARRELS,
PETITIONERS**

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**On Petition for Review of the Decision of the
Tax Court of the United States**

BRIEF FOR THE RESPONDENT

LOUIS F. OBERDORFER,
Assistant Attorney General.

**LEE A. JACKSON,
HAROLD M. SEIDEL,**
*Attorneys,
Department of Justice,
Washington 25, D. C.*

I N D E X

	Page
Opinion below	1
Jurisdiction.....	1
Question presented	2
Statute involved	2
Statement	3
Summary of argument.....	6
Argument:	
The Tax Court correctly held that the amount taxpayer received under the agreement with Loew's relating to the production of a motion picture about her father's life was taxable income to her.....	8
Conclusion.....	15

CITATIONS

Cases:

<i>Beals' Estate v. Commissioner</i> , 82 F. 2d 268.....	10
<i>Commissioner v. Glenshaw Glass Co.</i> , 348 U.S. 426.....	10, 14
<i>Douglas v. Willcuts</i> , 296 U.S. 1.....	10
<i>Ehrlich v. Higgins</i> , 52 F. Supp. 805.....	9
<i>Fairfield v. American Photocopy, Etc. Co.</i> , 138 Cal. App. 2d 82, 291 P. 2d 194.....	9
<i>Farmers' & Merchants' Bank v. Commissioner</i> , 59 F. 2d 913.....	12
<i>Gen. Investors Co. v. Commissioner</i> , 348 U.S. 434.....	11
<i>Gill v. Curtis Publishing Co.</i> , 38 Cal. 2d 273, 239 P. 2d 630.....	9
<i>Gill v. Hearst Publishing Co.</i> , 40 Cal. 2d 224, 253 P. 2d 441.....	9
<i>Hawkins v. Commissioner</i> , 6 B.T.A. 1023.....	12
<i>Helvering v. Clifford</i> , 309 U.S. 331.....	10
<i>James v. Screen Gems, Inc.</i> , 174 Cal. App. 2d 650, 344 P. 2d 799.....	9

II

Cases—Continued	Page
<i>Kelly v. Johnson Publishing Co.</i> , 160 Cal. App. 2d 718, 325 P. 2d 659.....	9
<i>Liebes, H., & Co. v. Commissioner</i> , 90 F. 2d 932..	13
<i>McDonald v. Commissioner</i> , 9 B.T.A. 1340.....	12
<i>Melvin v. Reid</i> , 112 Cal. App. 285, 297 Pac. 91....	9
<i>Meyer v. United States</i> , 173 F. Supp. 920.....	14
<i>Miller v. Commissioner</i> , 35 T.C. 631.....	14
<i>Myers v. Commissioner</i> , 287 F. 2d 400, certiorari denied, 368 U.S. 828.....	14
<i>Runyon v. United States</i> , 281 F. 2d 590.....8, 12, 14	8, 12, 14
<i>Salvage v. Commissioner</i> , 76 F. 2d 112, affirmed, 297 U.S. 106.....	10
<i>Strickler v. National Broadcasting Co.</i> , 167 F. Supp. 68.....	9
<i>Yost v. Commissioner</i> , 155 F. 2d 121.....	10
Statutes:	
Internal Revenue Code of 1954:	
Sec. 61 (26 U.S.C. 1958 ed., Sec. 61).....	2, 10
Sec. 104 (26 U.S.C. 1958 ed., Sec. 104).....	3
Miscellaneous:	
I.T. 2420, VII-2 Cum. Bull. 123 (1928).....	11
Rev. Rul. 54-19, 1954-1 Cum. Bull. 179.....	11
Rev. Rul. 55-132, 1955-1 Cum. Bull. 213.....	11
Rev. Rul. 56-462, 1956-2 Cum. Bull. 20.....	11
Rev. Rul. 56-518, 1956-2 Cum. Bull. 25.....	12
Rev. Rul. 57-505, 1957-2 Cum. Bull. 50.....	12
Rev. Rul. 58-370, 1958-2 Cum. Bull. 14.....	12
Rev. Rul. 58-500, 1958-2 Cum. Bull. 21.....	12

**In the United States Court of Appeals
for the Ninth Circuit**

No. 17,358

**MAURIE STARRELS and DORIS W. STARRELS,
PETITIONERS**

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**On Petition for Review of the Decision of the
Tax Court of the United States**

BRIEF FOR THE RESPONDENT

OPINION BELOW

The Tax Court's opinion (R. 14-19) is reported at 35 T.C. 646.

JURISDICTION

This petition for review (R. 20-23) involves federal income taxes for the calendar year 1956. On July 14, 1958 (R. 3) the Commissioner of Internal Revenue mailed to the taxpayers notice of a deficiency in the total amount of \$1,530.87 (R. 6-9). Within

ninety days thereafter and on October 2, 1958, the taxpayers filed a petition with the Tax Court for a redetermination of that deficiency under the provisions of Section 6213 of the Internal Revenue Code of 1954. (R. 3-9.) The decision of the Tax Court was entered on January 27, 1961. (R. 19.) The case is brought to this Court by petition for review filed March 23, 1961. (R. 20-23.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTION PRESENTED

The taxpayer¹ entered into an agreement with a motion picture studio permitting and helping it to make a motion picture dealing with her deceased father's life. Did the Tax Court correctly hold that the amount received by taxpayer under the contract was includible in her gross income?

STATUTE INVOLVED

Internal Revenue Code of 1954:

SEC. 61. GROSS INCOME DEFINED.

(a) *General Definition.*—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

* * * *

(26 U.S.C. 1958 ed., Sec. 61.)

¹ Doris W. Starrels will be hereafter referred to as the taxpayer. Maurie Starrels is a party to these proceedings only because he filed a joint tax return with his wife. (R. 12.)

SEC. 104. COMPENSATION FOR INJURIES OR SICKNESS.

(a) *In General.* — Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include—

(1) amounts received under workmen's compensation acts as compensation for personal injuries or sickness;

(2) the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness;

* * * *

(26 U.S.C. 1958 ed., Sec. 104.)

STATEMENT

All of the facts in this case were stipulated (R. 11-13, 14) and may be summarized as follows:²

The taxpayer and her sister, Lila Berman, are the daughters and only issue of the late Commander Frank W. Wead, U.S.N. (R. 14.)

Loew's, Inc., desired to produce a motion picture concerning naval aviation and ultimately did produce and market such a picture. It intended the photoplay to be "based on, adapted from, or using as a spring-board the life story" of Commander Wead. (R. 15.)

² Attached to and incorporated in the Stipulation of Facts were certain exhibits. (R. 11-13.) This Court has approved a stipulation between the parties to the effect that the exhibits need not be included in the printed record but that the parties and the Court may refer to and consider them as if they were in that record. (R. 25.)

In 1954, in furtherance of this purpose, Loew's purchased from the Beverly Hills National Bank and Trust Company, trustee under the will of Commander Wead, the literary material entitled "We Plaster the Japs" which was written by Commander Wead and published in the September, 1944, issue of American Magazine. (R. 15.)

Loew's also entered into an agreement with taxpayer and her sister on November 9, 1954, which consisted of two documents: a letter from Loew's to the sisters referred to as an option and a letter from the sisters to Loew's referred to as a release. Among other things, the terms of the agreement provided:

(a) The sisters agreed to permit Loew's to produce, release, distribute, and exhibit a motion picture based on the life of their late father, Commander Wead. (R. 15.)

(b) They agreed to permit Loew's to depict their deceased father, themselves, and other members of their family in the photoplay and in the advertising and publicity thereof and to use actual names or fictitious names for themselves and other members of their family, and to use actual and wholly and partially fictitious incidents. (R. 15; Ex. 3-C.)

(c) The sisters promised that at no time would they claim or assert that the photoplay or any matter therein contained or any use made by Loew's of the names, likenesses, pictures, or characterizations of their father, themselves, or other members of their family under the agreement constituted a violation

of any of their rights including their rights of privacy. (R. 15-16.)

(d) They agreed to deliver to Loew's such material in the way of photographs, letters, family documents, facts, or other material or information and suggestions which were available and which could be helpful in the preparation of the motion picture. (R. 16.)

(e) The sisters agreed that during the life of the agreement they would not authorize others to produce or exhibit any motion picture photoplay nor would they consent to the portrayal, depiction, or impersonation of their father or of themselves in any other motion picture. (R. 16.)

(f) Loew's was further granted the right to advertise, promote, and exploit the photoplay by all means customarily used in the trade. (R. 16.)

(g) The sisters were to receive jointly a sum of \$2,400 upon the execution of the agreement and were to be paid further sums upon the happening of specified events and/or upon the satisfaction of certain conditions. (R. 16.)

(h) They agreed to use their best efforts to assist the bank and its agent in obtaining approval and the necessary signatures for its (the bank's) sale to Loew's of "We Plaster the Japs". (Ex. 4-D.)

(i) Lastly, the sisters granted Loew's copyright renewals to "We Plaster the Japs", and appointed Loew's their attorney in fact to execute all documents necessary to obtain extensions and renewals of the copyright. (Ex. 4-D.)

In 1956 Loew's produced and distributed throughout the United States a feature motion picture entitled "The Wings of Eagles" which depicted events taken from the life of Commander Wead. (R. 16.)

Pursuant to the agreement of November 9, 1954, Loews paid taxpayer the sum of \$5,800 in 1956. On her joint income tax return, she noted this receipt as "payment for invasion of personal family rights—not included as taxable income". The Commissioner in his deficiency notice determined that the entire amount of the receipt from Loew's should have been included in taxable income. (R. 16-17.) The Tax Court sustained the Commissioner (R. 19) and the taxpayer takes this appeal.

SUMMARY OF ARGUMENT

The taxpayer received an amount, in part, as consideration for release of her right to privacy. The sum is taxable to her as consideration for the contractual release of a legal right. Taxpayer realized a gain or increment from receipt thereof, and by voluntarily releasing her right to privacy taxpayer precluded injury from any action taken on the basis of the release. An analogous situation from the tax point of view is the consideration received for a covenant not to compete, which is taxable as ordinary income.

The consideration received for waiving the right to privacy is treated for tax purposes differently from amounts received as damages for a tortious invasion of that right. In the former situation there cannot be any injury by virtue of the consent, and the con-

sideration for surrendering the right is gain to the recipient. In the latter case, the damages make the injured party whole for the loss of his personal rights and the restitution is therefore not taxable income, but, in a sense, return of capital.

However, assuming *arguendo* that the amount received for surrender of the right to privacy is to be treated in the same manner as damages for a tortious violation of the right, taxpayer nevertheless cannot prevail here because the record is devoid of evidence showing that she actually suffered any invasion of her privacy by reason of the production and distribution of the picture. In the absence of such evidence, the amount received did not make her whole but was gain to her.

Taxpayer's argument that the motion picture depicting events in her father's life was damaging to her privacy fails to recognize that there is no evidence that she was even mentioned in the picture and that she has, under California law, no right to privacy in her father's life.

Although taxpayer only indirectly appears to rely on the exclusionary provisions of Section 104(a)(2) of the 1954 Internal Revenue Code, the section is inapplicable because its terms are not met here and because the legislative history of the section indicates that it was not intended to apply to situations such as the taxpayer's.

ARGUMENT

The Tax Court Correctly Held That the Amount Taxpayer Received Under the Agreement With Loew's Relating to the Production of a Motion Picture About Her Father's Life Was Taxable Income to Her

Pursuant to an agreement entered into by Loew's with taxpayer and her sister granting Loew's permission to make a film (R. 12) "based on, adapted from, or using as a springboard the life story" of taxpayer's father, taxpayer received \$5,800 in 1956 (R. 16). The agreement contained a number of other provisions in one of which taxpayer consented to be portrayed in the picture and in the advertising for the picture. In another provision, taxpayer agreed that she would at no time claim that the picture constituted a violation of her privacy. Taxpayer apparently argues that the \$5,800 was received solely for release of her right to privacy and that that sum is excludable from her gross income.³

It is well-settled that under California law the taxpayer has a right to her own privacy which includes the "right to be let alone", to be protected from unwarranted and undesired publicity. The right to privacy is independent of rights of property, contract, reputation and physical integrity. The injury is mental and subjective and depends on whether the actor should have known that the act would offend the sen-

³ As the Tax Court noted (R. 17) taxpayer does not contend in the alternative that there has been a sale or exchange of a capital asset entitling her to report the amount realized as capital gain. Cf. *Runyon v. United States*, 281 F. 2d 590 (C.A. 5th).

sibilities of a normal person. *Gill v. Hearst Publishing Co.*, 40 Cal. 2d 224, 253 P. 2d 441; *Gill v. Curtis Publishing Co.*, 38 Cal. 2d 273, 239 P. 2d 630; *Fairfield v. American Photocopy Etc. Co.*, 138 Cal. App. 2d 82, 291 P. 2d 194; *Melvin v. Reid*, 112 Cal. App. 285, 297 Pac. 91. The right to privacy is different from the "right to publicity" which does exist in California (*Strickler v. National Broadcasting Co.*, 167 F. Supp. 68 (S.D. Cal.)) ; since the right to privacy is personal and does not survive the person involved, taxpayer had no right to privacy in her father's life (*Kelly v. Johnson Publishing Co.*, 160 Cal. App. 2d 718, 325 P. 2d 659; *James v. Screen Gems, Inc.*, 174 Cal. App. 2d 650, 344 P. 2d 799).

The release or waiver of a legal right extinguishes that right and permits the person to whom the waiver runs to do certain acts which the law otherwise prohibits and for which it grants a cause of action. Thus, taxpayer by releasing her right to privacy to Loew's and permitting it to portray her in the motion picture in effect extinguished that right with respect to that picture. She consented to an invasion of her privacy by the picture (within the scope of the release), an invasion which never occurred. Because the gravamen of the right to privacy is freedom from unwarranted publicity, the waiver of the right (or the consent to the publicity) precludes any damage and negates any injury.

As the late Judge Fee pointed out in *Ehrlich v. Higgins*, 52 F. Supp. 805, 809 (S.D. N.Y.), the income tax consequences of being compensated for a contractual surrender of the legal right to privacy are

that the amounts received are taxable as ordinary income as, for example, are amounts received for surrendering the legal right to compete in business.⁴

Section 61(a) of the Internal Revenue Code of 1954, *supra*, provides that "gross income means all income from whatever source derived." The Supreme Court has held that this language was used by Congress to exert its full constitutional power to tax incomes, and that any increment or gain received by a taxpayer (not expressly excepted by the statute) is therefore subject to tax. *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 429; *Helvering v. Clifford*, 309 U.S. 331, 334; *Douglas v. Willcuts*, 296 U.S. 1, 9. In *Glenshaw Glass Co.*, *supra*, the Court sustained on that ground the inclusion in income of punitive damages awarded the taxpayer in an anti-trust suit, despite the fact that the damages were not derived from capital, or labor, or both combined. In that case it stated (pp. 429-430) that:

This Court has frequently stated that this language was used by Congress to exert in this field "the full measure of its taxing power." *Helvering v. Clifford*, 309 U.S. 331, 334; *Helvering v. Midland Mutual Life Ins. Co.*, 300 U.S. 216, 223; *Douglas v. Willcuts*, 296 U.S. 1, 9; *Irwin v. Gavit*, 268 U.S. 161, 166. * * * Congress applied no limitations as to the source of taxable receipts, nor restrictive labels as to their nature. And the Court has given a liberal con-

⁴ *Yost v. Commissioner*, 155 F. 2d 121 (C.A. 9th); *Beal's Estate v. Commissioner*, 82 F. 2d 268 (C.A. 2d); *Salvage v. Commissioner*, 76 F. 2d 112 (C.A. 2d), affirmed, 297 U.S. 106.

struction to this broad phraseology in recognition of the intention of Congress to tax all gains except those specifically exempted. * * *

See also *Gen. Investors Co. v. Commissioner*, 348 U.S. 434.

The amounts received for the contractual surrender of a legal right therefore are taxable because they result in increment or gain to the recipient.

Taxpayer apparently contends that since amounts received as compensation for tortious conduct are excludable from income the \$5,800 that she received for surrendering her right to privacy is similarly excludable. This argument fails to distinguish between the voluntary release of a right to privacy and an involuntary tortious loss of that personal right. As stated above, by surrendering her legal right, taxpayer has permitted certain conduct and has acknowledged that she will not be injured thereby and that the publicity will not offend her sensibilities.

However, in the case of a tortious invasion of privacy or loss of other personal rights, there is an involuntary loss of the right involved. The exclusion of damages for tortious conduct is predicated on the ground that the damages restored the recipient to his status prior to the tortious conduct suffered, i.e., that the damages are an attempt to make the recipient whole by restitution for the loss of his personal rights. See I.T. 2420, VII-2 Cum. Bull. 123 (1928), and Rev. Rul. 54-19, 1954-1 Cum. Bull. 179 (wrongful death award); Rev. Rul. 55-132, 1955-1 Cum. Bull. 213, and Rev. Rul. 56-462, 1956-2 Cum. Bull. 20 (awards to maltreated prisoners of war); Rev. Rul.

56-518, 1956-2 Cum. Bull. 25; Rev. Rul. 57-505, 1957-2 Cum. Bull. 50; Rev. Rul. 58-370, 1958-2 Cum. Bull. 14; and Rev. Rul. 58-500, 1958-2 Cum. Bull. 21 (payments by foreign countries to victims of persecution for loss of personal rights).

Damages for defamation of a man's personal reputation and character (*Hawkins v. Commissioner*, 6 B.T.A. 1023), breach of contract to marry (*McDonald v. Commissioner*, 9 B.T.A. 1340) and for a tortious injury to goodwill (*Farmers' & Merchants' Bank v. Commissioner*, 59 F.2d 913 (C.A. 6th)) have similarly been held not taxable on the ground that such payments recompense the taxpayer and make him whole for the damages suffered.

Since the consenting person admits, in effect, that no wrong will be done to him by the act permitted through surrender of his legal right, an entirely different tax result obtains where there is a voluntary waiver, for consideration, of a legal right in that there is no ensuing injury and tortious loss of a personal right. As stated in *Runyon v. United States*, (S.D. Fla.), decided June 24, 1959 (4 A.F.T.R. 2d 5354), affirmed, 281 F. 2d 590 (C.A. 5th) (on the ordinary income versus capital gain issue)—

The * * * contention of the plaintiff, that the proceeds of this contract were actually the prepayment of compensatory damages, is without merit, for compensatory damages presuppose injury or wrong, *Sanders v. Rolink*, 67 N.Y.S. 2d 652, 188 Misc. 627, *Reid v. Terwilliger*, 116 N.Y. 530, 22 N.E. 1091. There has been no legal injury or wrong in this case * * *.

The court below did not base its decision on this ground, however, (R. 18-19), but, assuming, *arguendo*, that the two situations are to be treated the same for tax purposes, held that the taxpayer at bar cannot prevail because there was no showing in fact that her privacy had been invaded (R. 18), and thus she had not established that she suffered any injury.

The record in this case, contrary to the assumption in taxpayer's brief (Br. 4), is simply devoid of any evidence indicating that there was an actual invasion of her privacy. The record only shows that the picture, "The Wings of Eagles", depicted events from the life of her father, but there is not a shred of evidence that taxpayer was portrayed in the film, or that there was even any reference to her in the picture. Hence, even if it is further assumed, *arguendo*, that taxpayer received the \$5,800 solely for the release of her right to privacy,⁵ there is no basis in the record

⁵ In point of fact, taxpayer received the \$5,800 not only for waiving her right to privacy but also for agreeing to render services such as delivering photographs, letters family documents, and other family information to Loew's. (R. 16.) Taxpayer also agreed to use her best efforts to obtain approval and the necessary signatures for the bank's sale of "We Plaster the Japs" to Loew's. (Ex. 4-D.) Compensation for agreeing to render such services is, of course, taxable as ordinary income to taxpayer whether or not she actually was called upon to render those services. Since she failed to show the amount, if any, of the \$5,800 that was allocable to the release of her right to privacy, and the amounts that were allocable to compensation for her services and for consenting to the other provisions of the agreement, taxpayer did not carry her burden of proving the Commissioner's determination erroneous and in no event could she therefore prevail. *H. Liebes & Co. v. Commissioner*, 90 F.2d 932, 935 (C.A. 9th).

for concluding that her privacy was invaded, and thus, the \$5,800 cannot be considered as recompense which made her whole for an injury to her.⁶

Since the \$5,800 was not such compensation, that sum perforce was taxable gain to her under the rationale of *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 429. The same conclusion was reached in *Meyer v. United States*, 173 F. Supp. 920 (E.D. Tenn.). See also *Runyon v. United States*, 281 F. 2d 590 (CA 5th); *Miller v. Commissioner*, 35 T.C. 631, 641, appeal pending (C.A. 2d); and *Myers v. Commissioner*, 287 F. 2d 400 (C.A. 6th), certiorari denied, 368 U.S. 828.

Taxpayer argues (Br. 4-5) that public exhibition of her family life is *ipso facto* an invasion of her privacy; she ignores the lack of evidence bearing on an invasion of her privacy and the California cases holding that there is no right to privacy in another's life.

It should be noted that taxpayer in her argument does not rely on Section 104(a)(2) of the 1954 Internal Revenue Code, *supra*, although she does make reference to it in stating the question involved in this appeal. Section 104(a)(2) provides that gross income does not include "the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness." Section 104(a)(2) pat-

⁶ It is interesting to note that taxpayer's petition to the Tax Court (R. 3-5) failed to state a cause of action even under this view of the law for she alleged therein neither that her right to privacy had been invaded nor facts leading to that conclusion.

ently is not applicable because the taxpayer did not receive any damages on account of a personal injury. Not only was there no injury (as we have pointed out above) but taxpayer received the \$5,800 not on account of an injury but rather (in part) for the release of a right. In sum, we submit that the amount received by taxpayer for consenting to a potential invasion of her privacy was properly includible in her gross income and that the taxpayer has not carried her burden of affirmatively establishing that the decision below was clearly erroneous.

CONCLUSION

For the reasons stated above, the decision of the Tax Court should be affirmed.

Respectfully submitted,

LOUIS F. OBERDORFER,
Assistant Attorney General.

LEE A. JACKSON,
DAVID ~~AO~~.WALTER,
HAROLD M. SEIDEL,
Attorneys,
Department of Justice,
Washington, D. C.

JANUARY, 1962.

